



September 19, 2014

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

*Re: Protecting and Promoting the Open Internet, **GN Docket No. 14-28**; Amendment of the Commission's Rules Related to Retransmission Consent, **MB Docket No. 10-71**; Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations, **MB Docket No. 14-57***

Dear Ms. Dortch:

On September 11 2014, I presented the main points of an academic paper at *Regulating the Evolving Broadband Ecosystem*, a workshop co-hosted by the FCC, the American Enterprise Institute for Public Policy Research and the University of Nebraska-Lincoln College of Law. The following employees of the Commission attended all, or part of the workshop:

Tim Brennan, Chief Economist, also Office of Strategic Planning, (OSP); Amanda Burkett, (OSP); Jonathan Chambers, Chief, (OSP); Matthew Collins, Wireless Telecommunications Bureau (WTB); Nicolas Degani, Office of Commissioner Pai; Ena Dekanic, Legal Fellow, International Bureau (IB); Matthew DelNero, Deputy Bureau Chief, Wireline Competition Bureau (WCB); Judith Dempsey, (WTB); Martin Doczkat, Office of Engineering and Technology (OET); Kristine Fargotstein, (WCB); Sherille Ismail, (OSP); Pramesh Jobanputra, (WTB); Scott Jordan, Chief Technologist, (also OSP); Jonathan Levy, Deputy Chief Economist, (also OSP); Charles Mathias, Associate Bureau Chief, (WTB); Catherine Mataves, (WTB); Jon Sallet, General Counsel; Susan Singer, Chief Economist, (WTB); Gigi Sohn, Office of the Chairman; Daniel Shiman, Media Bureau (MB); Walt Strack, Chief Economist, (IB); Antonio Sweet, (OSP); Sarah Weeks, (OET); and Irene Wu, (IB).

The purpose of the workshop was to promote analysis on the future of broadband regulation through a series of academic presentations and discussions between scholars and Commission staff. I attach a copy of my presentation slides and a paper entitled *The Costs and*

*Benefits of Regulatory Intervention in Internet Service Provider Interconnection Disputes: Lessons from Broadcast Signal Retransmission Consent Negotiations.*

I currently hold the Pioneers Chair and serve as Professor of Telecommunications and Law at Penn State University, but note that the views expressed in the paper and slide presentation are mine alone.

The presentation and paper constitute my unsponsored research that compares and contrasts two types of commercially-driven, arm's length negotiations: 1) between television broadcasters and Multichannel Video Programming Distributors ("MVPDs"); and 2) among and between Internet Service Providers ("ISPs") and content providers. My research suggests that the nature and scope of the Commission's involvement in retransmission negotiations might provide a model for its oversight of ISP interconnection and compensation negotiations. Currently the FCC addresses the degree of direct or indirect statutory authority it has to oversee such arrangements. On two occasions, an appellate court has reversed the Commission on grounds that it unlawfully imposed common carrier duties on ISPs that operate as private carriers offering information services.

My paper and presentation assess whether and how ISPs can satisfy consumers' sometimes conflicting interests in having the Internet function as an as open and nondiscriminatory conduit for access to content, but also to facilitate the timely and high quality transmission of bandwidth intensive video content. I provide a summary of Internet development that explains how and why ISPs have created new interconnection and service pricing arrangements that offer quality of service enhancements to conventional "best efforts" routing. ISPs offering "Most Favored Nation" treatment of "mission critical," "must see" video traffic can reduce the potential for congestion and other network conditions that degrade service.

My presentation offers a balanced assessment of options for ISPs to negotiate voluntary and commercially driven traffic delivery enhancements. Such price and quality of service discrimination can enhance consumer welfare while also providing ISPs with additional revenues. I explain that such paid prioritization can occur without making it possible for ISPs to engage in unreasonable discrimination and blocking of traffic.

My paper and presentation also examine the extent to which the FCC can oversee ISP interconnection and compensation negotiations to ensure that the parties deal with each other in good faith and achieve timely resolution of disputes. I endorse an emphasis on procedure and an explicit acknowledgement that the Commission lacks statutory authority to prescribe terms and conditions, mandate binding arbitration, or assess the commercial reasonableness of terms and conditions that parties have adopted without complaint.

I believe the non-substantive, procedural safeguards established by the FCC for retransmission consent negotiations, provide an appropriate and legally sound model for ISP negotiations. Section 325(b)(3)(A)(2013) of the Communications Act, as amended, expressly authorizes the FCC "to govern the exercise by television broadcast stations of the right to grant retransmission consent." The Commission has interpreted this section as supporting efforts to ensure that the parties negotiate in good faith by establishing procedural safeguards such as

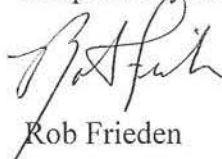
foreclosing negotiating blocs representing two or more broadcast stations having the largest market share. The Commission wisely has refrained from requests that it do more and cross over to impacting the substantive terms and conditions that the parties will apply. For example, the Commission has refrained from requiring MVPD carriage of broadcast signals while the parties work to resolve their dispute.

I believe that the Commission should exercise similar restraint in the negotiation process among ISPs and between ISPs and creators or distributors of content. We have seen a number of high profile Internet interconnection and compensation disputes achieve resolution without the FCC's intervention just as retransmission consent disputes reach closure before significant inconvenience to viewers.

On the other hand, the paper and presentation do support procedural safeguards that obligate the parties to negotiate in good faith and seek resolution on a timely basis. Internet-mediated streaming of content can trigger near immediate consumer frustration and anger when content becomes unavailable, or subject to degraded and congested delivery. Because of the potential for consumer harm, the FCC should respond quickly to any complaint and generate an evidentiary record to confirm that all parties have negotiated in good faith.

If the FCC can use discipline and modesty to refrain from making substantive decisions affecting commercial transactions, I believe it will find that nonstructural and procedural requirements can work effectively.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rob Frieden", written over a horizontal line.

Rob Frieden

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